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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 660

A. N. SPANEL,

Petitioner,

vs.

DR. BORIS BERKMAN and DR. SOPHIA BERKMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the petitioner herein, by his duly authorized attorneys, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 20, 1948 (R. 451), rehearing denied January 14, 1949 (R. 473). The court of appeals dismissed the appeal of Spanel, the petitioner here, from a judgment adverse to him in the trial court, without consideration of the merits, on the sole ground that Spanel had accepted a small sum of money awarded by an otherwise adverse judgment of the trial court.

In support of this petition, your petitioner respectfully shows:

Opinions Below

The district court did not prepare or publish a formal opinion. The opinion of the court of appeals (R. 442) is reported at 171 F. (2d) 513.

Jurisdiction

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, §1254(1).

Summary Statement of Matter Involved

On April 5, 1945, A. N. Spanel, the petitioner, and the respondents, Dr. Sophia Berkman and Dr. Boris Berkman, entered into a contract for research on the medical utility of colloidal chlorophyll, a new product produced by the Berkmans (R. 254-265, 32). The Berkmans agreed to construct and operate a pilot plant for the production of colloidal chlorophyll and to conduct animal and clinical experimentation with that product. Spanel agreed to and did provide $25,000 in cash to be expended exclusively for the pilot plant construction and operation and the experimentation. The contract expressly provided that no part of the fund supplied by Spanel was to be "paid to, or retained by, the Inventors [the Berkmans] as compensation or otherwise. . ." The contract specified that the animal and clinical experimentation was for determination of the medicinal and therapeutic value of colloidal chlorophyll, and the operation of the pilot plant for determination of the cost of commercial production (R. 256-7, 380, 394-5).

At any time after December 31, 1946, Dr. Boris Berkman was permitted by the contract to certify to Spanel his

determination that the production, sale and use of colloidal chlorophyll for pharmaceutical, therapeutic and medicinal purposes were commercially feasible. The contract required that the certificate (1) be based upon reliable research data, from animal and clinical experiments, establishing medicinal value, (2) be based upon reliable research data, from the pilot plant operation, establishing commercial feasibility, and (3) be made in good faith. Upon the rendering of a certificate which complied with the contract, Spanel was required to elect, within thirty days, either to invest $125,000 in a corporation to be formed for the exploitation of colloidal chlorophyll, or to abandon all his rights in the Berkman process and product (R. 258-9, 395).

After receiving the $25,000 from Spanel, the Berkmans proceeded with the production and experimental use of colloidal chlorophyll and expended nearly all of Spanel's $25,000 for that purpose (R. 215-6, 380-3, 242). On December 3, 1946, the Berkmans rendered a report on their research, and on January 16, 1947, Dr. Boris Berkman delivered to Spanel a certificate reciting his determination that it was commercially feasible to produce, sell and use colloidal chlorophyll for pharmaceutical, therapeutic and medicinal purposes. Dr. Berkman then called upon Spanel either to forfeit all his interest in the colloidal chlorophyll project, or to invest an additional $125,000 in a corporation to be formed for the exploitation of colloidal chlorophyll (R. 398-9, 266, 32).

Immediately upon the delivery of the Berkman certificate, the operation of the pilot plant and all further research stopped (R. 118).[1] As appears from the evidence,

[1] The one exception was an animal research project in the process of completion at the University of Wisconsin already paid for with Spanel's funds (R. 107-8).

Spanel's funds had, for all practical purposes, been exhausted, and the balance of $973.98 remaining could not finance any further research. Along with the certificate of January 16, 1947, Dr. Berkman had sent a letter in which he stated:

> "I believe that my sister and I have accomplished in full all that could possibly be expected under these arrangements, particularly in the light of the amount of money at our disposal." (R. 267, 269-70, 32.)

On pre-trial deposition read into evidence, Dr. Berkman testified that he terminated research because "I did not have any money left at all" (R. 119), and at the trial, Dr. Berkman testified that he produced no more colloidal chlorophyll because he did not have any more funds (R. 118).[2]

On February 13, 1947, Spanel filed his complaint for declaratory judgment in the District Court of the United States for the Northern District of Illinois, Eastern Division, seeking a declaration that the Berkman certificate was invalid because it lacked good faith and was unsupported by the reliable research data the contract required. Spanel further sought a declaration that the research phase of the project had not been terminated and, therefore, that the Berkman attempt to make him elect between an investment of $125,000 and an abandonment of his interest in the exploitation of colloidal chlorophyll was ineffective (R. 2-4). Jurisdiction of the district court was based on diversity of citizenship and the requisite jurisdictional amount (R. 394).

Dr. Berkman testified at the trial that his certificate was based exclusively upon the usefulness of colloidal chlo-

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[2] It was the acceptance by Spanel of the return of $973.98, the insignificant residue of the $25,000 fund provided exclusively for research under the contract, which was ultimately held to bar his appeal, although that residue, as appears above, was concededly inadequate for further research.

rophyll as a vitamin product (R. 72, 82-3, 97, 105-6). Dr. Berkman conceded, however, that the value of colloidal chlorophyll as a vitamin source had been determined only theoretically and that notwithstanding the contract requirement of clinical experimentation, he had made no clinical studies of the vitamin usefulness of his product (R. 114-5). Further, although the contract provided specifically that the Berkmans were to "ascertain the cost of commercial production of colloidal chlorophyll" (R. 257), Dr. Berkman conceded that he had made no such determination (R. 86, 244-5, 249, 250).[3]

After trial on the merits, the district court denied the relief sought by Spanel and gave judgment in favor of the Berkmans on the main issues of the case. The district court held that (1) the Berkman certificate was supported by reliable research data establishing therapeutic value and commercial feasibility, (2) the certificate being valid, Spanel had forfeited his rights, (3) the pilot plant and the small unexpended cash balance ($973.98 out of $25,000.00) remained the property of Spanel (R. 401-2).

Judgment was entered on October 15, 1947 (R. 402). On November 6, 1947, without execution having been issued, the Berkmans voluntarily paid Spanel the sum of $973.98, the unexpended balance of Spanel's funds found to be his by the district court, and a document entitled "Partial Satisfaction of Judgment," reflecting the pay-

[3] Although the ultimate finding of the trial court was that the Berkman certificate met the requirements of the contract of April 5, 1945, the detailed findings showed that only animal and not clinical experimentation had been conducted with colloidal chlorophyll as a vitamin source, and that only raw material cost and not the cost of production of colloidal chlorophyll had been determined (Findings 13, 16; R. 396-7). There was a total absence of the clinical experimentation and determination of cost and commercial feasibility specifically required by the contract as a foundation for the certificate; on this there is no dispute in the evidence.

ment, was filed in the district court (R. 403). Thereafter, Spanel filed in the district court a timely notice of his appeal to the Court of Appeals for the Seventh Circuit (R. 404).

On February 16, 1948, the Berkmans filed a motion to dismiss the appeal of Spanel on the ground that his acceptance of the $973.98, found to be his by the district court, operated as a waiver of his right to appeal (R. 423-4). In his response to the motion to dismiss, Spanel offered, in the event that the court was in doubt about his right both to retain that sum and to prosecute his appeal, to deposit the funds with the clerk of the court of appeals to await disposition by that court (R. 425-6). The motion was denied but leave was given for its renewal upon argument on the merits (R. 429). The motion was then renewed (R. 431), and in response Spanel repeated his tender of the $973.98 for deposit with the clerk to await the direction of the court of appeals (R. 440). The court of appeals dismissed Spanel's appeal (R. 451). It held that his receipt of the $973.98 and his partial satisfaction of judgment below operated as an estoppel and waiver of his statutory right to appeal because inconsistent with the relief he sought in the court of appeals (R. 442-450). The court also ruled that Spanel's tender of the $973.98 to await its direction could not be given effect because to do so would render the "general rule" which the court of appeals applied "meaningless" (R. 449).

Questions Presented

I.

Whether the court of appeals erred in determining that the acceptance by Spanel of an incidental benefit under a judgment adverse to him waived his statutory right of appeal.

II.

Whether, even if the acceptance of such a benefit may operate as a waiver, the court of appeals erred in refusing to relieve Spanel of the waiver, upon his tender of the $973.98 he had previously accepted.

III.

Whether, even if the acceptance of such a benefit under an adverse judgment may under some circumstances operate as a waiver, the court of appeals erred in regarding Spanel's acceptance of a benefit as inseparable from the portion of the judgment appealed from and as a waiver under the circumstances of this case.

Reasons for Granting Certiorari

I.

In deciding that Spanel's acceptance of an incidental benefit under a judgment adverse to him waived his statutory right to appeal, the court of appeals decided an important federal question in conflict with the decision of this Court in *Erwin* v. *Lowry*, 7 How. 172 (1849), and in conflict with the decision of the Court of Appeals for the First Circuit in *Jones* v. *Pettingill*, 245 Fed. 269 (C. A. 1st 1917), cert. denied 245 U. S. 663 (1917).

II.

In so deciding, the court of appeals decided an important federal question with respect to appellate practice which should be decided by this Court, because of the practical inconsistency of the decision of the court of appeals with the Rules of Civil Procedure, Rule 62(d), and the statutory provision for interest on judgments, 28 U. S. C. § 1961.

ARGUMENT IN SUPPORT OF PETITION.

I.

In deciding that Spanel's acceptance of an incidental benefit under a judgment adverse to him waived his statutory right to appeal, the court of appeals decided an important federal question in conflict with the decision of this Court in Erwin v. Lowry, 7 How. 172 (1849), and in conflict with the decision of the Court of Appeals for the First Circuit in Jones v. Pettingill, 245 Fed. 269 (C. A. 1st 1917), cert. denied 245 U. S. 663 (1917).

The court of appeals dismissed Spanel's appeal on the single ground that his acceptance of benefits under the district court's judgment was inconsistent with an appeal from that judgment. Accordingly, it found that a waiver or estoppel existed, and that Spanel was permanently barred from prosecuting his appeal. The duty of the court to consider Spanel's appeal is statutory (Title 28 United States Code § 1291), but its refusal to hear the appeal rests solely on an assumed rule of practice as to which it thought there was "little if any dispute". Such a rule of practice affecting the statutory right of appeal is not only without sanction in the decisions of this Court, but is in conflict with them.

In *Erwin* v. *Lowry*, 7 How. 172 (1849), this Court ruled on the precise proposition here presented. There Lowry sought to recover from Erwin property allegedly taken illegally. Lowry had judgment in the court of first instance, and Erwin was ordered to convey to him the property sought by Lowry's petition. The Supreme Court of Louisiana affirmed, but directed that Lowry be put into possession of the property awarded to him only after he had deposited, either with Erwin or with the sheriff of

the parish, the sum of $436.55. Lowry deposited that sum with the sheriff, and Erwin, although he was under no compulsion so to do, accepted it from the sheriff and receipted therefor. Erwin sued out a writ of error from this Court. Lowry, thereupon, moved to dismiss on the ground that Erwin's acceptance of the fund and the issuance of his receipt operated as a release of errors. The Court denied the motion to dismiss, saying:

> "Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights." (7 How. 172, 184).

Erwin v. *Lowry* was twice called to the attention of the court of appeals (R. 439, 455). It is controlling on the motion to dismiss. Without even mentioning the decision of this Court, the court of appeals held directly contrary to the *Erwin* case that a release of errors *was* implied—and hence the right of appeal waived—by the acceptance of money under the judgment. In so doing, the court of appeals followed a line of cases in other courts of appeals which also ignored *Erwin* v. *Lowry*.

Erwin v. *Lowry* has never been criticized or overruled by this Court. It appears to have been followed (again in a decision in conflict with the action of the court of appeals in the instant case) in *Merriam* v. *Haas*, 3 Wall. 687 (1864) (incompletely reported). This Court has subsequently held on numerous occasions, although in a different con-

text, that, in the absence of a *supersedeas,* no rights are affected by proceeding under an erroneous decree. Upon reversal, it becomes the duty of the courts to restore the *status quo ante.* The performance of this duty has been directed even where the court granting restitution was otherwise without jurisdiction of the action. *Northwestern Fuel Co.* v. *Brock,* 139 U. S. 216 (1891). And this Court has rested such decisions on *Erwin* v. *Lowry,* the very case which the court of appeals has disregarded. *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134, 145 (1911). *United States* v. *Dashiel,* 3 Wall. 688 (1866), although not presenting the same direct conflict with the decision of the court of appeals in the instant case as does *Erwin* v. *Lowry,* is entirely inconsistent with it in theory. There a judgment creditor had obtained partial satisfaction of its judgment on execution. Unlike the instant case, moreover, the amounts received were a part of a unitary judgment at law which had apparently been challenged by the judgment debtor. This Court, unembarrassed even in 1866 by the technical notion of estoppel which controlled the court of appeals here, refused to dismiss the judgment creditor's writ of error.

The dismissal of the appeal of Spanel being plainly in conflict with this Court's decision in *Erwin* v. *Lowry,* it is perhaps unnecessary to add that it is also in conflict with the decision of the Court of Appeals for the First Circuit in *Jones* v. *Pettingill,* 245 Fed. 269, 276-277 (C. A. 1st 1917), *cert. denied* 245 U. S. 663 (1917). There Pettingill brought an action against Jones to recover property in Jones' possession. The relief sought by Pettingill was granted, but he was required to pay to Jones the sum of $1,464.55 as a result of certain expenditures made by Jones which benefited the property. Immediately after the entry of the district court's decree,

Jones accepted from Pettingill the sum of $1,464.55 and filed his receipt for that amount with the court, reciting therein that it was "in full compliance with the order" of the court. Thereafter Jones appealed to the court of appeals, and Pettingill moved to dismiss on the ground that Jones' acceptance of the sum paid him constituted an estoppel. The court of appeals, relying upon *Erwin* v. *Lowry,* refused to hold that Jones had forfeited his right to appeal. It said:

> "The right to appeal is a right not to be held waived, except upon clear and decisive grounds. The District Court, which holds his [Jones'] receipt, can, upon reversal, restore both parties to their rights as they stood before said payment was made, by directing proper repayment to Pettingill." (245 Fed. 269, at 277.)

This decision of the Court of Appeals for the First Circuit is squarely in conflict with the judgment below in the Seventh Circuit. And again no explanation of the conflict is attempted in the opinion of the court of appeals.

The decision below rests upon a doctrine serving no useful purpose in the administration of justice and operating only as the most technical kind of trap for the unwary. Cf. *Hoiness* v. *United States,* 335 U. S. 297 (1948). The judgment was in three parts. The first held the Berkman certificate to be in compliance with the contract requirements. From that portion of the judgment Spanel appealed. The second held that the pilot plant, built with Spanel's money, was his property. From that portion of the judgment the Berkmans appealed and judgment was affirmed. The third provided that the small unexpended balance of Spanel's money ($973.98) remained Spanel's property. No appeal from this portion of the judgment was taken by any party. The money was voluntarily paid

by the Berkmans and accepted by Spanel. Upon that basis alone Spanel was denied his statutory right of review of the judgment holding the Berkman certificate valid and Spanel's investment forfeited. Apart from the fact that the small incidental money judgment went unchallenged by any party, its acceptance could not possibly have prejudiced the Berkmans, respondents here, *first,* because there was inherent power in the court to restore to the Berkmans whatever they had paid, in the event the judgment was subsequently reversed (*Erwin* v. *Lowry,* 7 How. 172 (1849); *Northwestern Fuel Co.* v. *Brock,* 139 U. S. 216 (1891); *Arkadelphia Milling Co.* v. *St. L. S. W. Ry. Co.,* 249 U. S. 134 (1911); and *second,* because, whatever the power of the courts to enforce restitution, Spanel had voluntarily tendered the funds he had received, for disposition by the court.

II.

In deciding that Spanel's acceptance of an incidental benefit under a judgment adverse to him waived his statutory right to appeal, the court of appeals decided an important federal question with respect to appellate practice which should be decided by this Court, because of the practical inconsistency of the decision of the court of appeals with the Rules of Civil Procedure, Rule 62(d), and the statutory provision for interest on judgments, 28 U. S. C. § 1961.

Even in the absence of the conflict with the decisions in *Erwin* v. *Lowry,* 7 How. 172 (1849) and *Jones* v. *Pettingill,* 245 Fed. 269 (C. A. 1st 1917), *cert. denied* 245 U. S. 663 (1917), the instant case would present an important question of federal practice meriting the attention of this court, since the decision below cannot be reconciled, in principle, either with the statute governing interest on judgments, 28 U. S. C. § 1961, or the rule governing the

method of obtaining a stay of judgment while an appeal is pending, Fed. R. Civ. P. 62 (d).

First, the court's decision is inconsistent, as a practical matter, with Rule 62(d) of the Federal Rules of Civil Procedure which permits a stay of execution only after the person seeking the stay has filed a supersedeas bond approved by the court. Under the decision of the court of appeals a stay is in fact imposed where a litigant is only partially successful, without compliance with or reference to Rule 62(d). A judgment creditor is compelled either to forego execution, even though no supersedeas has been filed, or to forfeit a statutory review on the merits of the portion of the judgment adverse to him.

Second, the holding of the court of appeals is inconsistent as a practical matter with 28 U. S. C. § 1961. That section of the Judicial Code allows interest on any money judgment recovered in a civil case in the district court. Of course, interest may be stopped by an appropriate tender. The rule applied by the court of appeals confronts litigants, awarded a judgment in part but seeking to appeal, with the alternative of either giving up the right to interest under 28 U. S. C. § 1961, or giving up the right to appeal under 28 U. S. C. § 1291. No such alternative can be read into the statute or justified on principle.

The court of appeals, by making forfeiture of the right to appeal the price of accepting voluntary performance by a judgment debtor of his obligations, has imposed a penalty on the judgment creditor. The rule and statute were designed to protect, not penalize him.

The absence of prejudice being so clearly established, the action of the court of appeals in denying Spanel his right to a review flies in the face of the settled policy of the federal courts to avoid affecting substantial rights

because of insubstantial procedural defects. Cf. Federal Rules of Civil Procedure, Rule 61. The policy, requiring a reversal of the judgment of the court of appeals here, is set forth with great clarity in section 269 of the old Judicial Code[4] which read in part as follows:

> "On the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

CONCLUSION

Petitioner has been denied his right of appeal by the application of a technical, irrational notion of estoppel. The acceptance of an incidental benefit, to which he was admittedly entitled, was held by the court of appeals to forfeit the right of appeal even though petitioner had tendered for deposit with the court the small amount he had received. The payment of what was due prejudiced no one; and the tender of the amount to the clerk of the court erased even imagined prejudice. The application of estoppel under such circumstances is in direct conflict with the decisions of this Court and of the Court of Appeals for the First Circuit. More than that, it brings to appellate procedure a formalistic, hyper-technical approach repugnant to the simplified system of federal practice designed to promote the ends of justice. The court of appeals in the

[4] 28 U. S. C., Sec. 391. Although this statute has now been repealed (Act of June 25, 1948, c. 645, Sec. 21, 64 Stat. 862, effective September 1, 1948) it is applicable to cases pending at the time of repeal, since prior rights and liabilities are not affected by the repeal. **Hoiness v. United States**, 335 U. S. 297, 300-1, note 6 (1948). The instant appeal was taken and was pending prior to September 1, 1948 (R. 404).

instant case has reverted to an approach in which substantive rights must yield to technical notions of consistency. Even a hundred years ago, when it decided *Erwin* v. *Lowry,* this Court did not subscribe to that approach to justice.

Accordingly, petitioner prays that a writ of certiorari may be issued to the United States Court of Appeals for the Seventh Circuit in the cause entitled *A. N. Spanel,* Plaintiff-Appellant, v. *Dr. Boris Berkman, et al.,* Defendants-Appellees, No. 9534 in that Court, in order that the judgment of the court of appeals dismissing petitioner's appeal may be reviewed by this Court.

Respectfully submitted,

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